

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JULIAN TRIANA**

Claimant

VS.

**CB & I CONSTRUCTORS, INC.**

Respondent

AND

**ZURICH AMERICAN INSURANCE CO.**

Insurance Carrier

Docket No. **1,036,404**

**ORDER**

Respondent and its insurance carrier request review of the April 6, 2009 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 21, 2009.

**APPEARANCES**

James R. Roth of Wichita, Kansas, appeared for the claimant. D. Steven Marsh of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant suffered a 12.5 percent whole person functional impairment.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant sustained a 70 percent work disability based upon a 39.5 percent task loss and a 100 percent wage loss.

Respondent requests review of the nature and extent of claimant's disability, i.e. the percentage of claimant's work disability. Respondent argues claimant has a wage loss

between 55 to 58 percent and when averaged with a 12.9 percent task loss results in a 33.95 to 35.45 percent work disability. Conversely, claimant argues he is entitled to an 83 percent work disability based on a 66 percent task loss and a 100 percent wage loss.

The sole issue for Board determination is the nature and extent of claimant's disability, specifically the percentage of claimant's work disability (a permanent partial general disability greater than the functional impairment rating).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed that claimant was injured as a result of a fall at work for respondent on June 20, 2007. Claimant suffered mildly displaced transverse process fractures at L1, L2, and L3. Treatment included pain medications, anti-inflammatories, a back brace, trigger point injections in the lumbar muscles, and physical therapy.

Dr. Pat Do, a board certified orthopedic surgeon, provided treatment for claimant beginning July 6, 2007. Dr. Do released claimant at maximum medical improvement on January 22, 2008. Dr. Do noted claimant still had lower thoracic lumbar spine pain and that he might always have some chronic pain. Based upon the *AMA Guides*<sup>1</sup>, the doctor concluded claimant had a 6 percent whole person functional impairment. The doctor imposed permanent restrictions for claimant regarding lifting and carrying from 0-10 pounds continuously, 11-20 pounds frequently, 21-50 pounds occasionally, and not at all greater than 51 pounds. Dr. Do further restricted claimant regarding pushing and pulling from 0-25 pounds continuously, 26-50 pounds frequently, 51-75 pounds occasionally, 76-100 pounds not at all. Dr. Do restricted claimant to occasional ladder and stair climbing as well as bending, twisting and turning. Finally, Dr. Do limited claimant from frequent standing and walking.

Claimant returned to Dr. Do for a follow-up appointment on August 5, 2008. Claimant continued to complain of back pain. Dr. Do did not change his impairment rating but he did alter claimant's permanent restrictions. The restrictions were that claimant could lift 0-20 pounds continuously; 21-50 pounds frequently and 51-100 pounds occasionally. Claimant could push and pull from 0-25 pounds continuously; 26-75 pounds frequently and 76-100 pounds occasionally. Claimant was allowed to bend to 90 degrees on a frequent basis.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The August 2008 restrictions were less stringent and Dr. Do could not specifically recall why he changed claimant's permanent restrictions at that time. But he agreed that he sometimes changes restrictions when told by the patient that they are having trouble finding a job and would like less stringent restrictions to improve their chance of obtaining employment.

Dr. Do later again reviewed the tables in the *AMA Guides* and amended claimant's functional impairment rating to a 10 to 15 percent whole person rating. Dr. Do reviewed the list of claimant's former work tasks prepared by Ms. Karen Terrill and concluded claimant could no longer perform 7 of the 54 non-duplicative tasks for a 13 percent task loss.

At the request of claimant's attorney, Dr. Pedro Murati examined claimant on February 14, 2008, for a permanent partial impairment evaluation. Claimant complained of back pain radiating into both hips with the left greater than the right. Dr. Murati diagnosed claimant with back pain with signs and symptoms of radiculopathy; left SI joint dysfunction; and transverse fracture L1, L2, and L3. Dr. Murati rated the claimant using the *AMA Guides* and based upon the DRE Lumbosacral Category II for the transverse process fracture L1, L2, and L3 opined claimant suffered a 15 percent permanent partial whole person functional impairment. Dr. Murati imposed permanent restrictions that claimant engage in no crawling; only occasional lift/carry or push/pull greater than 20 pounds. The doctor further limited claimant to rarely bend, crouch or stoop and occasionally sit, climb stairs or ladders, squat and drive. The doctor indicated claimant should be limited to frequent standing and walking as well as lifting, carrying, pushing, pulling to 10 pounds. Finally, Dr. Murati noted claimant should alternate sitting, standing and walking.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Jerry Hardin and concluded claimant could no longer perform 36 of the 56 non-duplicative tasks for a 64 percent task loss. It should be noted that Mr. Hardin concluded there was a 66 percent task loss which Dr. Murati adopted assuming the math was correct, but Mr. Hardin did not accurately calculate the percentage of task loss.

Jerry Hardin was asked by claimant's attorney to perform a vocational evaluation of claimant. In his report dated June 24, 2008, he identified 56 non-duplicative tasks claimant performed in the 15 years before his injury. Mr. Hardin opined that the claimant retained the ability to earn \$320 per week.

Respondent's attorney hired vocational expert Karen Crist Terrill to evaluate claimant. Ms. Terrill met with claimant on November 3 and 14, 2008. Ms. Terrill, in her report dated November 29, 2008, identified 54 non-duplicative tasks claimant performed in the 15 years before his injury. Ms. Terrill opined that claimant was capable of earning from \$377.20 to \$572.80 per week.

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. Supp. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. Supp. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This claim was submitted to the ALJ and the review before the Board was held before the Kansas Supreme Court's *Bergstrom*<sup>2</sup> decision, which abrogated the good faith requirement for work disability. Consequently, the Board's analysis must change to conform to the current state of the law. The test is no longer whether claimant made a good faith effort post-injury to retain his employment with respondent and to find appropriate employment. Instead, the Supreme Court in *Bergstrom* said that the fact finder should follow and apply the plain language of the statute. Because claimant's injuries are not covered by the schedule of injuries in K.S.A. 44-510d, his compensation is set out in K.S.A. 44-510e. It provides that once an injured worker is no longer earning 90 percent or more of his pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. In this case, claimant testified that when he was released from treatment by Dr. Do, his employment was terminated. And when the record closed, the claimant was still not employed. Consequently, he has suffered a 100 percent wage loss.

In this case the task loss opinions ranged from Dr. Do's 13 percent to Dr. Murati's 64 percent. The ALJ concluded that neither opinion was more persuasive and averaged

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<sup>2</sup> *Bergstrom*, \_\_\_ Kan. \_\_\_, 214 P.3d 676 (2009).

the opinions. In this instance, the Board agrees and concludes claimant has met his burden of proof to establish that he suffered a 39 percent task loss.

The work disability is determined by averaging the task loss with the wage loss.<sup>3</sup> Accordingly, the claimant has suffered a 70 percent work disability. The Board affirms the ALJ's determination of claimant's work disability but for the foregoing reasons.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 6, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Roth, Attorney for Claimant  
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>3</sup> K.S.A. 44-510e(a).